

Memorandum 2014-6

**Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Preliminary Analysis of Relevant Policy Interests**

At the direction of the Legislature, the Commission<sup>1</sup> is studying the relationship between mediation confidentiality and attorney malpractice and other misconduct.<sup>2</sup> The Commission is at an early stage of its study; it is still researching the area and has not yet begun drafting legislation. This memorandum presents a preliminary analysis of the relevant policy interests. Due to time constraints and the demands of other projects, the analysis is not as thorough and detailed as the staff hoped to be able to provide. We will flesh out the analysis as this study proceeds.

In the past few months, the Commission received the following new communications relating to this study:

	<i>Exhibit p.</i>
• Ron Kelly, Berkeley (10/11/13) .....	1
• Ron Kelly, Berkeley (1/21/14) .....	3
• William Rehwald, <i>Hide and Seek: the Uniform Fraudulent Transfer Act</i> .....	4
• Jerome Sapiro, San Francisco (10/17/13).....	13
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The Commission also received some news articles that the staff has not yet presented in a memorandum. In addition, the staff has a collection of pertinent news articles we have been compiling since the current mediation confidentiality statutes were enacted in 1997. We have not yet presented those materials to the

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorell)).

Commission because we first want to check the rules regarding republication and obtain any necessary approval.

The next section of this memorandum briefly describes the new communications. The remainder of the memorandum identifies and discusses key policy considerations, without yet attempting to measure or balance those considerations.

## NEW COMMUNICATIONS

The Commission is fortunate to have been receiving abundant input during this study, from a variety of knowledgeable sources with differing backgrounds and viewpoints. Many of the comments express an opinion on the ultimate question before the Commission: Whether, and, if so, how, to revise existing California law governing mediation confidentiality to better address attorney malpractice or other misconduct.

The Commission is still in the information-gathering stage of its study and is not yet ready to attempt to answer that question. For now, the staff will simply summarize the general nature of the new communications. We will delve into their details as appropriate later in the study.

The new communications are as follows:

- *Ron Kelly*. Mr. Kelly submitted two letters,<sup>3</sup> each of which describes some possible approaches for the Commission's consideration. He provides useful background information on those options. His letters will be helpful when the staff prepares a memorandum that presents a variety of options for the Commission to consider.
- *William Rehwald*. Mr. Rehwald submitted an article he wrote, entitled *Hide and Seek: the Uniform Fraudulent Transfer Act*.<sup>4</sup> In that article, he discusses the possibility that parties will attempt to use mediation to shelter a fraudulent marital settlement agreement from disclosure. He concludes that existing law would satisfactorily address the hypothetical he presents. He relies on Evidence Code Section 1123(d) (written settlement agreement prepared in mediation is not inadmissible or protected from disclosure if signed by settling parties and "used to show fraud, duress, or illegality that is relevant to an issue in dispute"), and explains that "mediation confidentiality cannot be used to perpetrate a fraud."<sup>5</sup>

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3. Exhibit pp. 1-2, 3.

4. Exhibit pp. 4-12.

5. *Id.* at 11.

- *Nancy Yeend*. Ms. Yeend presents “four fundamental points”<sup>6</sup> for the Commission to consider before drafting recommendations to the Legislature. She argues the merits of each point. Her analysis will be useful when the Commission is ready to begin evaluating different options.
- *Jerome Sapiro and Richard Zitrin*. Mr. Sapiro submitted a short article written by Richard Zitrin, entitled *Mediation Confidentiality, We Need Exceptions*.<sup>7</sup> Mr. Sapiro considers Mr. Zitrin “to be one of the most respected authorities in legal ethics.”<sup>8</sup> In his article, Mr. Zitrin concludes: “California needs a strong mediation confidentiality rule. We also, clearly, need reasonable exceptions.”<sup>9</sup> In an email to the Commission, Mr. Zitrin “urge[s] reform, and reform that would be retroactive as to issues between a client and his/her/its own lawyer.”<sup>10</sup>

#### PRELIMINARY ANALYSIS OF RELEVANT POLICY CONSIDERATIONS

As yet, the Commission has not resolved the precise scope of this study. It previously decided, however, that “[t]he staff should begin by focusing on attorney malpractice and other attorney misconduct, which is clearly within the scope intended by the Legislature ....”<sup>11</sup> Thus, the policy analysis below focuses on the intersection of mediation confidentiality and attorney misconduct.

In undertaking this analysis, it is important to note that many of the relevant policy considerations are not susceptible to precise measurement, or perhaps even to rough quantification. That will complicate the Commission’s task of weighing the competing interests, but it does not bear on the validity of the policy considerations in question.

Rather, the situation is similar in this regard to many of the bedrock principles recognized in the state and federal Constitutions, such as the right of free speech.<sup>12</sup> It is widely believed that free, uninhibited speech has salutary effects, such as the promoting the search for truth<sup>13</sup> and sound resolution of public issues.<sup>14</sup> Those effects are difficult to demonstrate, much less quantify, yet the country nonetheless concluded that free speech warrants constitutional

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6. Exhibit pp. 14-15.

7. Exhibit pp. 17-20.

8. Exhibit p. 13.

9. *Id.* at 19.

10. *Id.* at 16.

11. Minutes (Aug. 2013), p. 3.

12. U.S. Const. amend. I, XIV; Cal. Const. art. I, §§ 2(a), 3(b).

13. See, e.g., *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

14. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

protection. Similarly, competing interests (such as “protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers”)<sup>15</sup> may also be difficult to quantify. Nonetheless, courts have balanced such interests against free speech interests and, in some circumstances, they have determined that the right of free speech must yield.<sup>16</sup> In other words, courts have recognized the validity of the policy considerations on both sides of the equation, even though it is difficult to weigh them and select an appropriate balance.

We begin by discussing policy considerations that favor mediation confidentiality, and then turn to competing considerations. Next, we describe some policy concerns that might be triggered if the law was revised to permit disclosure of mediation communications for purposes of proving attorney misconduct. Finally, we discuss a few additional policy considerations that are relevant to the ongoing study.

### **Factors Favoring Mediation Confidentiality**

The main policy argument for mediation confidentiality rests on four key premises:

- (1) Confidentiality promotes candor in mediation.
- (2) Candid discussions lead to successful mediation.
- (3) Successful mediation encourages future use of mediation to resolve disputes.
- (4) The use of mediation to resolve disputes is beneficial to society.

We examine each of those premises below.

#### *Confidentiality Promotes Candor in Mediation*

Like the constitutional guarantees of free speech, mediation confidentiality is meant to foster productive debate and discussion, albeit only in a particular setting among a select group of participants. As the Uniform Law Commission (“ULC”) explained in the Uniform Mediation Act (“UMA”),

[M]ediators typically promote a candid and informal exchange regarding events in the past, as well as the parties’ perceptions of and attitudes toward these events, and ... encourage parties to think constructively and creatively about ways in which their differences might be resolved. *This frank exchange can be achieved*

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15. Florida Bar v. Went for It, Inc., 515 U.S. 618, 624 (1995).

16. *Id.* at 635.

*only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.*<sup>17</sup>

Mediation confidentiality thus serves to “assure prospective [mediation] participants that their interests will not be damaged, first, by attempting this alternative means of resolution, and then, once mediation is chosen, by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement.”<sup>18</sup>

The magnitude of this effect is not readily measurable. It is commonsense, however, that a person will be more likely to disclose sensitive, private, embarrassing, harmful, or incriminating information if the person receives assurance that the disclosure will not later be used against the person.

#### *Candid Discussions Lead to Successful Mediation*

“It is only natural that the more candid and open parties are during settlement proceedings, the more likely their efforts are to be successful.”<sup>19</sup> As this Commission once explained:

A frank settlement discussion can help disputants understand each other’s position and improve prospects for a successful, mutually satisfactory settlement of the dispute. A gesture of conciliation or other step towards compromise can increase the likelihood of reaching an agreement.<sup>20</sup>

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17. National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act, *Prefatory Note* (2003) (emphasis added); see also *Cassel v. Superior Court*, 51 Cal. 4th 113, 123, 125, 132-33, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011); *Foxgate Homeowners’ Ass’n v. Bramalea California, Inc.*, 26 Cal. 4th 1, 14, 17, 25 p.3d 1117, 128 Cal. Rptr. 2d 642 (2001); *Wimsatt v. Superior Court*, 152 Cal. App. 4th 137, 150, 61 Cal. Rptr. 3d 200 (2007); *Porter v. Wyner*, 107 Cal. Rptr. 3d 653, 661 (2010) (formerly published at 183 Cal. App. 4th 949).

18. *Cassel*, 51 Cal. 4th at 132-33; see also *Fair v. Bakhtiari*, 40 Cal. 4th 189, 194, 147 P.3d 653, 51 Cal. Rptr. 3d 871 (2006) (mediation confidentiality provisions of Evidence Code “were enacted to encourage mediation by permitting the parties to frankly exchange views, without fear that disclosures might be used against them in later proceedings”); *Foxgate*, 26 Cal. 4th at 15 (purpose of confidentiality is to promote candid and informal exchange regarding past events); Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 Geo. L.N. 2663, 2663-64 (1995) (when representatives in dispute have constituencies with widely different views of case, and meeting with “enemy” itself is considered signal of weakness, negotiations will not occur unless they can be held in privacy).

19. Kerwin, Note, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond*, 12 Rev. Litig. 665, 665 (1983); see also Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings L.J. 955, 959 (1988).

20. *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations*, 29 Cal. L. Revision Comm’n Reports 345, 351 (1999).

Similarly, the California Supreme Court has observed that candor is “necessary to a successful mediation.”<sup>21</sup> According to the Court, mediation “demands ... that the parties feel free to be frank not only with the mediator but also with each other.”<sup>22</sup> The Court has thus warned that “[a]greement may be impossible if the mediator cannot overcome the parties’ wariness about confiding in each other during these sessions.”<sup>23</sup>

Resolving a dispute through mediation might require candid, robust discussion not only from the parties themselves, but also from other mediation participants. As the Commission said in proposing the current mediation confidentiality provisions, “[a]ll persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them.”<sup>24</sup>

In *Cassel v. Superior Court*, for example, the California Supreme Court focused on private attorney-client conversations that occur during a mediation. It concluded that protecting the confidentiality of such conversations, even when the client desires disclosure, might serve legitimate interests:

[T]he Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant’s counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either.<sup>25</sup>

In other words, mediation confidentiality might help make an attorney feel comfortable bluntly advising a client about weaknesses of the client’s case, which the client otherwise may not want to acknowledge. Based on what the attorney learns during the mediation, and what the client hears, the attorney might encourage the client to settle for less than what the client thought was reasonable before the mediation. Such blunt advice might lead the client to accept a settlement that is in the client’s best interest, but is less favorable than what the client originally hoped to obtain. Later, the client might have buyer’s remorse and blame the attorney for convincing the client to take the settlement. Mediation

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21. *Cassel*, 51 Cal. 4th at 117.

22. *Foxgate*, 26 Cal. 4th at 14.

23. *Id.*

24. *Mediation Confidentiality*, 26 Cal. L. Revision Comm’n Reports 407, 425 (1996).

25. *Cassel*, 51 Cal. 4th at 136.

confidentiality enables the attorney to give blunt advice to the client without fear of such reprisal.

According to the California Supreme Court, the Legislature might also have determined that extending mediation confidentiality to private attorney-client discussions “gives maximum assurance that disclosure of an ancillary mediation-related communication will not, perhaps inadvertently, breach the confidentiality of the mediation proceedings themselves, to the damage of one of the mediation disputants.<sup>26</sup> In other words, protecting *all* mediation communications (not just some of them) might be the best means of assuring the disputants that they can talk freely, without worrying about whether their disclosures might later become public.

Further, mediation confidentiality might embolden an attorney to disclose a sensitive personal matter in a mediation, in hopes of helping achieve a favorable settlement for the client. For example, an attorney might tell the mediator about a stupid mistake the attorney once made, to help persuade the mediator that the mediation opponent might have made a similar stupid mistake in the dispute at hand. Absent mediation confidentiality, the attorney might prefer to keep quiet about this embarrassing personal experience.

Similar considerations might apply to the mediator, an expert attending the mediation (e.g., a tax accountant or a doctor), or a party’s spouse or other mediation participant. Assuring them that they can speak openly at the mediation might help promote success in the mediation.

Here again, however, it is difficult to ascertain the extent to which such an effect is actually occurring. To the best of the staff’s knowledge, there is no way to measure how candid mediation parties and other mediation participants are, and determine whether increased candor helps achieve settlement. Gut perceptions of experienced people might be the only reasonable measuring tool available, and such perceptions are sometimes wrong. Still, it is worth noting that, as this Commission previously reported, “[t]here is broad consensus that ... confidentiality is crucial to effective mediation.”<sup>27</sup>

#### *Successful Mediation Encourages Future Use of Mediation to Resolve Disputes*

Another premise underlying mediation confidentiality is that successful mediation of a dispute will promote future use of mediation to resolve other

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26. *Cassel*, 51 Cal. 4th at 136.

27. *Mediation Confidentiality*, *supra* note 24, at 413; see, e.g., Uniform Mediation Act, *supra* note 17, *Prefatory Note*.

disputes. In the case law and the scholarly literature, this premise is generally left unstated. It seems reasonable to assume, however, that the extent to which disputants will choose to mediate is tied to what they know about mediation success rates. If disputants view mediation as a costly, useless procedure, few disputants will want to mediate; if disputants view mediation as an effective means of achieving a satisfactory settlement, many disputants will choose to mediate. Perceptions of the effectiveness of mediation (or lack thereof) presumably correlate with actual success rates, and thus with the volume of future mediations.

*The Use of Mediation to Resolve Disputes is Beneficial to Society*

The final premise underlying mediation confidentiality is a widespread belief that “[i]t is in the public interest for mediation to be encouraged ....”<sup>28</sup> In establishing a mediation pilot project, the Legislature succinctly explained this point:

In the case of many disputes, litigation culminating in a trial is costly, time consuming and stressful for the parties involved. Many disputes can be resolved in a fair and equitable manner through less formal processes.

... Alternative processes for reducing the cost, time, and stress of dispute resolution, such as mediation, have been effectively used in California and elsewhere. In appropriate cases mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly in resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system.<sup>29</sup>

Mediation thus promotes multiple policy objectives. It is consistent with democratic ideals of self-determination, because disputants directly participate in the process and strive to reach “a mutually acceptable agreement.”<sup>30</sup> A court can compel disputants to mediate,<sup>31</sup> but it cannot compel them to settle; any settlement must be voluntary. “The parties’ participation in the process and control over the result contributes to greater satisfaction on their part.”<sup>32</sup> Because the resolution is amicable, mediation may also be less stressful than litigation.

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28. Code Civ. Proc. § 1775(c).

29. Code Civ. Proc. § 1775(b), (c); see also *Wimsatt*, 152 Cal. App. 4th at 150.

30. Evid. Code § 1115(a).

31. See, e.g., Code Civ. Proc. §§ 1775-1775.15

32. Uniform Mediation Act, *supra* note 17, *Prefatory Note*.

Through creativity, mediation may even result in a win-win solution for the disputants, in which both sides are able to attain their key objectives.<sup>33</sup>

In addition, a successful mediation allows disputants to avoid prohibitive litigation expenses. As the Legislature has noted,

Mediation and similar alternative processes can have the greatest benefit for the parties in a civil action when used early, before substantial discovery and other litigation costs have been incurred. Where appropriate, participants in disputes should be encouraged to utilize mediation ... for resolving their differences in the early stages of a civil action.<sup>34</sup>

Similarly, each successful mediation helps reduce court congestion, allowing judges to resolve the remaining cases more promptly and with a greater degree of care, which will promote equitable results. At present, California's judicial system is struggling to cope with budget cuts and limited resources. Many courthouses have closed and court employees have been subject to furloughs and layoffs. By conserving judicial resources, successful mediations will help California cope with these difficulties. Mediation confidentiality might be helpful to achieve this effect and the other mediation benefits described above. Unfortunately, however, this crucial point is difficult to prove or disprove.

#### **Factors Favoring Disclosure of Mediation Communications to Establish Attorney Malpractice or Other Misconduct**

With respect to mediation communications bearing on legal malpractice or other attorney misconduct, the policy analysis against mediation confidentiality has several components:

- Mediation confidentiality may deprive a party of evidence that would help prove that an attorney committed malpractice or engaged in other misconduct.
- Because mediation confidentiality may result in exclusion of relevant evidence, legal malpractice or other attorney misconduct may go unpunished.
- Allowing legal malpractice and other attorney misconduct to go unpunished may undermine attorney-client relations and the administration of justice.
- Allowing legal malpractice and other attorney misconduct to go unpunished may chill future use of mediation and deprive the state of its benefits.

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33. R. Fisher & W. Ury, *Getting to Yes* 56-80 (2d ed. 1991).

34. Code Civ. Proc. § 1775(d).

We discuss each of these points below.

*Exclusion of Evidence of Attorney Malpractice or Other Misconduct*

An attorney, “by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.”<sup>35</sup> “The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity ....”<sup>36</sup> An attorney is also “an officer of the court and is bound to work for the advancement of justice.”<sup>37</sup>

In representing a client at a mediation, an attorney might sometimes make a significant mistake, one stemming from failure to exercise due care on the client’s behalf. For example, an attorney might give a client erroneous advice on the tax implications of a particular settlement approach, or might inadvertently disclose a trade secret or damaging evidence.

An unscrupulous attorney might even be dishonest in a mediation, to the client’s detriment. For example, as previously discussed in this study, an attorney might promise to reduce a client’s fee to convince the client to settle the case, then later renege on that promise.<sup>38</sup>

In the course of a mediation, an attorney might also say something that reveals that the attorney engaged in prior misconduct. For example, an attorney might admit to having lost a critical piece of evidence that a client entrusted to the attorney.

In each of these situations, California’s strict mediation confidentiality statutes might preclude a client from introducing evidence of the attorney’s culpable or incriminating mediation communications in a later proceeding against the attorney. As the California Supreme Court explained in *Cassel*, the confidentiality requirement may “result in the unavailability of valuable civil evidence.”<sup>39</sup> How often this happens, and how significant any loss of evidence might be, is difficult to estimate.

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35. *Lucas v. Hamm*, 56 Cal. 2d 583, 591, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

36. *Cox v. Delmas*, 99 Cal. 104, 123, 33 P. 836 (1893).

37. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

38. See Memorandum 2013-47, p. 1013, Exhibit pp. 3-4.

39. *Cassel*, 51 Cal. 4th at 136; see also *id.* at 135.

*Loss of Evidence May Mean Culpable Conduct Goes Unpunished or Other Inequitable Result Occurs*

Because mediation confidentiality can lead to exclusion of relevant evidence, in some instances it might mean that legal malpractice or attorney misconduct goes unpunished. As Justice Chin said in his concurring opinion in *Cassel*,

The court holds today that private communications between an attorney and a client related to mediation remain confidential even in a lawsuit between the two. This holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a *criminal* prosecution against the attorney. This is a high price to pay to preserve total confidentiality in the mediation process.<sup>40</sup>

Similarly, the majority in *Cassel* recognized that mediation confidentiality “may compromise [a client’s] ability to prove his claim of legal malpractice.”<sup>41</sup> Of particular note, the court of appeal in *Porter* warned of the possibility that “[c]lients would be precluded from pursuing any remedy against their own counsel for professional deficiencies occurring during the mediation process as well as representations made to the client to induce settlement.”<sup>42</sup>

The frequency of such an effect is unclear: When mediation confidentiality precludes a client from introducing evidence against an attorney, that does not necessarily mean that the attorney engaged in legal malpractice or other misconduct, nor does it necessarily mean that the client will be unable to prove legal malpractice or other misconduct that actually occurred.

In California, a number of factors may help to mitigate the concern:

- In some cases, it might be possible to prove the malpractice or misconduct through evidence that is outside the scope of mediation confidentiality. Such proof is more likely if the malpractice or misconduct occurs before, rather than during, the mediation.
- Evidence does not become confidential merely because it was used during a mediation.<sup>43</sup>

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40. *Cassel*, 51 Cal. 4th at 138 (Chin, J., concurring) (emphasis in original; footnotes & citations omitted).

41. *Cassel*, 51 Cal. 4th at 119; see also *id.* at 133, 134; *Wimsatt*, 152 Cal. App. 4th at 162.

42. *Porter*, unpublished opinion at 961, 962.

43. Evid. Code § 1120; *Rojas v. Superior Court*, 33 Cal. 4th 407, 423 n.8, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (2004); *Wimsatt*, 152 Cal. App. 4th at 158.

- The mediation confidentiality statutes do not protect conduct at a mediation, only communications.<sup>44</sup>
- The mediation confidentiality statutes do not preclude admissibility and discoverability of mediation evidence in a criminal case or juvenile delinquency proceeding.<sup>45</sup>
- If a client settles in reliance on a factual assertion made in a mediation, the client can have that factual assertion incorporated into the written settlement agreement, which will be admissible if it is fully executed and provides for enforceability.<sup>46</sup>
- As pointed out by Mr. Rehwald,<sup>47</sup> a written settlement agreement prepared in mediation is not inadmissible or protected from disclosure under the mediation confidentiality statutes if it is signed by the settling parties and “used to show fraud, duress, or illegality that is relevant to an issue in dispute.”<sup>48</sup>

Although these factors may help reduce the likelihood that mediation confidentiality will jeopardize a client’s ability to prove legal malpractice or other attorney misconduct, they cannot completely eliminate that possibility. Misconduct that occurs during mediation (as opposed to pre-mediation misconduct) appears to be the most troublesome context.

The problem of excluding evidence that might be needed to ensure justice is not unique to the mediation confidentiality statutes. The same problem also arises with regard to the various evidentiary privileges recognized in the Evidence Code.<sup>49</sup> Each one is based on a legislative determination that the societal benefits of excluding a particular type of evidence outweigh the potential for injustice stemming from exclusion of that evidence. This type of legislative determination is hard to accept when faced with a specific instance of injustice occurring as a cost of the evidentiary rule.

Unsurprisingly, such rules have always been controversial. In fact, that is precisely why the Federal Rules of Evidence do not codify any specific privileges:

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44. See Evid. Code § 1119.

45. *Id.*; see also Evid. Code § 703.5; *Cassel*, 51 Cal. 4th at 135 n.11 (mediation confidentiality statutes would not protect attorney who is criminally prosecuted for fraud on basis of mediation-related oral communications); *Rinaker v. Superior Court*, 62 Cal. App. 4th 155, 72 Cal. Rptr. 2d 464 (1998).

46. See Evid. Code § 1123; see also Evid. Code §§ 1118 (procedure for memorializing oral agreement reached in mediation); 1124 (admissibility of oral agreement memorialized in accordance with Section 1118).

47. Exhibit p. 11.

48. Evid. Code § 1123.

49. Evid. Code §§ 930-1063.

Congress could not agree on which privileges to codify and in what manner, so it decided to defer to state law and federal common law on matters of privilege.<sup>50</sup>

*Allowing Legal Malpractice and Other Attorney Misconduct to go Unpunished May Chill Future Use of Mediation and Deprive the State of Its Benefits*

If potential mediation parties learn that culpable conduct in mediation could go unpunished due to mediation confidentiality, they might become reluctant to use the mediation process. Mediator Nancy Yeend puts it this way:

[P]rotecting malpractice will not instill confidence in the mediation process. There is a greater probability that fewer people will want to mediate, when they learn malpractice is protected.<sup>51</sup>

The extent to which such a chilling effect has occurred, or might occur in the future, is difficult to assess. Data on pre- and post-*Cassel* mediation rates might provide a little insight, because *Cassel* established that mediation confidentiality applies to attorney-client mediation discussions, “even if those discussions occurred in private, away from any other mediation participant.”<sup>52</sup> But such data might be influenced by other factors (e.g., clients’ lack of familiarity with the rule established in *Cassel*), and would not necessarily be a good predictor of future behavior.

Assuming that such a chilling effect occurs to some degree, it would tend to deprive the state of the benefits of mediation previously discussed. In other words, if the effect were sufficiently significant, it would undermine the very purpose of the mediation confidentiality statutes.

*Letting Culpable Conduct Go Unpunished or Other Inequitable Results Will Undermine the Effective Administration of Justice*

The state has an interest “in enforcing professional responsibility to protect the integrity of the judiciary and to protect the public against incompetent and/or unscrupulous attorneys.”<sup>53</sup> As the California Supreme Court recently stated, “[h]onesty is absolutely fundamental in the practice of law ....”<sup>54</sup> “A

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50. See Fed. R. Evid. 501; Miguel Méndez, *Evidence: The California Code and the Federal Rules: A Problem Approach* 663 (3d ed. 2004).

51. Exhibit p. 15; see also *Porter*, unpublished opinion at 961 (“[E]xpand[ing] the mediation privilege to also cover communications between a lawyer and his client would ... create a chilling effect on the use of mediations.”).

52. *Cassel*, 51 Cal. 4th at 123.

53. *Wimsatt*, 152 Cal. App. 4th at 153, quoting *Foxgate*, 26 Cal. 4th at 17 n.13.

54. *In re Glass*, \_\_\_ Cal. 4th \_\_\_, 2014 Cal. LEXIS 427, \*49 (No. S196374, filed Jan. 27, 2014).

lawyer's good moral character is essential for the protection of clients *and for the proper functioning of the judicial system itself.*"<sup>55</sup>

Whenever the judicial system fails to render justice in a case, that will tend to shake the public's faith in the system, and thus a fundamental underpinning of our form of government. The more often such a result occurs, and the more harsh and obvious the injustice, the greater the damage to public confidence in the judicial system.

When the unjust result favors an attorney, who is considered an officer of the court,<sup>56</sup> the impact may be especially damaging. The California Supreme Court has "constitutional authority over the practice of law in California."<sup>57</sup> Consequently, a failure to control attorney misconduct may thus reflect particularly badly on the Court and the entire judicial system.

Damage to public confidence can occur not only when there is actual injustice, but also when there is an appearance of injustice or even a possibility of it. For instance, in *Cassel*,<sup>58</sup> the client hoped to use mediation evidence to show that his attorneys committed legal malpractice, breach of fiduciary duty, fraud, and breach of contract. The mediation confidentiality statutes prevented use of the evidence, leaving one to wonder what would have happened otherwise. Although it is unclear whether actual attorney wrongdoing occurred, there might have been, and might continue to be, some degree of negative impact on the administration of justice.

Here again, the magnitude of the problem is difficult to measure. In *Wimsatt*, the court of appeal was convinced that it is of significant concern:

The stringent result we reach here means that when clients ... participate in mediation they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel. Certainly clients, who have a fiduciary relationship with their lawyers, do not understand that this result is a byproduct of an agreement to mediate. We believe that the purpose of mediation is not enhanced by such a result because wrongs will go unpunished and the administration of justice is not served.<sup>59</sup>

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55. *Id.* at \*38-\*39 (emphasis added).

56. See *Hickman*, 366 U.S. at 511.

57. *In re Garcia*, 58 Cal. 4th 440, 452, 2014 Cal. LEXIS 1 (No. S202512, filed Jan. 2, 2014).

58. 51 Cal. 4th 113.

59. 152 Cal. App. 4th at 162.

## Problems That Might Arise If Disclosure Were Permitted

Suppose that the mediation confidentiality statutes no longer barred a client from using mediation communications as evidence that his or her attorney committed legal malpractice or other misconduct. Obviously, such an approach could help to address the above-described concerns about the current mediation confidentiality statutes. But what other policy considerations would that kind of approach trigger?

### *Disrupted Confidentiality Expectations of Other Mediation Participants*

To the extent that they encourage open communication through assurance of confidentiality, California's mediation confidentiality provisions are similar to evidentiary privileges such as the lawyer-client privilege<sup>60</sup> or the physician-patient privilege.<sup>61</sup> But the mediation confidentiality provisions differ from such privileges in an important respect: the group to which confidentiality applies is larger and it lacks a community of interest; in fact, it includes the adversary in the dispute, as well as the adversary's counsel, the neutral mediator, and perhaps other participants. That makes the situation more complex from a policy standpoint.

If a client was allowed to introduce evidence that revealed mediation communications of other mediation participants, that would disrupt any expectation of confidentiality those participants had. As Justice Chin explained in his concurring opinion in *Cassel*,

Other participants in the mediation also have an interest in confidentiality. This interest may extend to private communications between the attorney and the client because those communications themselves will often disclose what others have said during the mediation.<sup>62</sup>

Although a client's attorney is his or her agent, other mediation participants are not bound to serve the client's interest. It may be unfair to disrupt their expectations of confidentiality. Moreover, such a disclosure might chill mediation communications and thus impede the effectiveness of mediation.

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60. Evid. Code §§ 950-962.

61. Evid. Code §§ 990-1007.

62. *Cassel*, 51 Cal. 4th at 139.

### *Unfairness to the Attorney*

If a client were permitted to introduce mediation evidence for purposes of showing legal malpractice or other attorney misconduct, how would the attorney put on a defense? Would mediation confidentiality prevent the attorney from defending the claim, allowing only half of the story to be told?

That would seem to be unfair, and could lead to an inequitable result against the attorney. As the Court said in *Cassel*,

The Legislature ... could rationally decide that *it would not be fair* to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.<sup>63</sup>

Just as an inequitable result against a client could adversely affect the administration of justice, so too could an inequitable result against an attorney.

As explained below, however, it might also be problematic to allow the attorney to use mediation communications to rebut the client's claim.

### *Pandora's Box Problem*

If an attorney could introduce mediation communications to rebut a client's claim of legal malpractice or attorney misconduct, then the confidentiality of the entire mediation might unravel piece by piece, as the client tries to show the misconduct, the attorney tries to justify his or her actions by establishing the context for them, the client seeks to rebut the attorney's characterization of the context, and so forth. In the end, the confidentiality of the mediation in question may essentially evaporate.

If such a result occurs, that might may chill settlement discussions at future mediations, and reduce the likelihood that such discussions will result in a mutually acceptable agreement. In turn, that might discourage future use of mediation and deprive the state of its benefits.

### *Adverse Impact on Perceptions of Mediator Impartiality*

In resolving a claim of legal malpractice or attorney misconduct, evidence of what the mediator said, or the mediator's recollection of statements made by

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63. *Cassel*, 51 Cal. 4th at 136; see also *id.* at 139 (Chin, J., concurring); *Porter*, unpublished opinion at 956.

other participants, might well be relevant. Excluding such evidence might distort the result, but admitting it may be particularly problematic.

Specifically, mediator testimony and mediator communications trigger special considerations, because it is critical for a mediator to be perceived as impartial.<sup>64</sup> No one will want to use a mediator who appears to be biased against them, yet it might be impossible for a mediator to maintain a reputation for impartiality if the mediator is forced to testify against a party, or the mediator's statements are used at a trial. This reality poses an additional challenge in trying to tailor mediation confidentiality to appropriately balance the competing interests in the context of alleged attorney misconduct.

### **Other Relevant Policy Considerations**

Several other policy considerations are also worth noting at this point in the Commission's study. The staff will alert the Commission to additional considerations as they become apparent later in the study.

#### *The Need for Clear Rules*

As this Commission observed when drafting the current mediation confidentiality statutes, clear rules governing mediation confidentiality are "critical to aid disputants in crafting agreements they can enforce."<sup>65</sup> Mediation participants need to be able to determine which statements will or will not be confidential and could be turned against them. It is particularly important to provide clear rules on when mediation confidentiality ends, so parties can determine whether a settlement agreement will be enforceable or will be unenforceable as a practical matter because it is confidential. That was main point of the reforms enacted the last time the Commission studied mediation confidentiality.<sup>66</sup>

In considering whether and, if so, how to revise the mediation confidentiality statutes, the Commission should be mindful of the need to provide clear statutory guidance. If the rules governing mediation confidentiality are ambiguous, that could chill mediation communications and thus chill the use of mediation.

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64. See generally Evid. Code § 703.5 (making mediator incompetent to testify except in specified circumstances, which include a State Bar disciplinary proceeding but not a legal malpractice claim).

65. *Mediation Confidentiality*, *supra* note 24, at 409.

66. *Id.* at 424.

*Special Considerations Apply When a Mediator Reports to a Decisionmaker*

A mediator “should not be able to influence the result of a mediation or adjudication by reporting or threatening to report to the decisionmaker on the merits of [a] dispute or reasons why mediation failed to resolve it.”<sup>67</sup> Thus, Evidence Code Section 1121 says:

1121. Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

The focus of this provision is on preventing coercion, ensuring that any settlement agreement reached in mediation is truly voluntary.<sup>68</sup> That is an important objective, which the Commission should keep in mind as this study progresses.

*Self-Interest and Expertise of the Stakeholders*

Mediator Nancy Yeend suggests that some lawyers and mediators might not want to create an exception to mediation confidentiality for legal malpractice because they are afraid of getting sued.<sup>69</sup> She refers to this as “the elephant in the room.”<sup>70</sup>

This possibility of self-interest is worth bearing in mind. The Commission should also consider, however, that lawyers and mediators are likely to be more knowledgeable and familiar with mediation than laypersons, putting them in a better position to evaluate the pros and cons of mediation confidentiality (e.g., the impact of confidentiality on candor and effectiveness of mediation).

**Summary**

In the above analysis, the staff has attempted to identify policy considerations that the Commission will need to consider as this study progresses. Virtually all of the considerations we have identified appear difficult, if not impossible, to quantify. **We encourage Commissioners, stakeholders, and other interested**

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67. Evid. Code § 1121 Comment.

68. *Id.*

69. Exhibit p. 15.

70. *Id.*

**persons to point out any considerations the staff has overlooked, and comment on the merits of the considerations we have identified.**

NEXT STEP

Among other things, the resolution authorizing the Commission to conduct this study directs it to consider “[t]he law in other jurisdictions, including the Uniform Mediation Act, as it has been adopted in other states, other statutory acts, scholarly commentary, judicial decisions, and any data regarding the impact of differing confidentiality rules on the use of mediation.”<sup>71</sup> **Unless the Commission otherwise directs, the staff’s next memorandum will begin to explore the law of other jurisdictions on the relationship between mediation confidentiality and attorney misconduct.** If time permits, we will also begin to examine scholarly commentary on the subject.

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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71. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorell)).

**Re: Study K-402 on Mediation Confidentiality**

Dear Commission Members and Staff,

**Public Comments.** Thank you for taking public comments at yesterday's meeting. Two ideas proposed seemed to generate interest from Commissioners – 1) a required disclosure notice to clients describing certain risks, and 2) a requirement that attorneys consent to disclosure of mediation communications in later alleged misconduct cases combined with a requirement that the names and contact information of all mediation participants be collected to also get their consent if needed.

**Framework for Potential New Statutes.** If the Commission does decide to pursue these ideas, the two draft statutes below may provide a useful starting point for discussion and staff development.

The summary of current law in paragraph 1 of the proposed notice was drafted and circulated for public comment in 2005 by the Administrative Office of the Courts. The AOC originally proposed that this summary be provided to all mediation participants prior to mediation, but eventually withdrew this proposed requirement. Although withdrawn, it's an excellent summary of current law.

The specific examples of risks and possible remedies in paragraphs 2 and 3 track points raised at yesterday's Commission meeting, and prior extensive negotiations and compromises reached in the drafting of the earlier Evidence Code section 1152.5 (a)(5) in 1993 (enacted through SB 401 by Lockyer) and discussions in drafting the current section 1123 in 1996 by the Commission. Reference to these discussions is noted in the recent Commission Memorandum 2013-39, pages 5-8, and in the 1996 Commission Memorandum 96-86, Staff Draft Recommendations, Staff Notes, pages 21-22, regarding current section 1123 (at that time numbered 1128), "...if a representation made in a mediation induces assent to an agreement, the participant relying on the representation should have it incorporated into the written agreement.").

The requirement for attorney consent to disclosure, and the requirement to request and retain the identities and contact information for all participants, combine Rule of Court 3.860 (which already applies to mediators) and the wording, as introduced, of AB 2025. Rule 3.860 was adopted by the AOC (effective January 1, 2006, and amended effective Jan. 1, 2007) and has governed all court-connected mediations since 2006.

Respectfully submitted,



Ron Kelly  
2731 Webster St.  
Berkeley CA 94705

**Draft Section 1129. Required Notice.** An attorney representing a client for purposes of a mediation shall provide the following notice to her or his client prior to the mediation.

### **INFORMATION AND CAUTION ON MEDIATION CONFIDENTIALITY**

**1. Summary of California Mediation Confidentiality Law.** To promote communication in mediation, California Evidence Code sections 703.5 and 1115–1128 establish the confidentiality and limit the disclosure, admissibility, and court's consideration of communications, writings, and conduct in connection with a mediation. In general, they provide:

a. All communications, negotiations, or settlement offers in the course of a mediation must remain confidential;

b. Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings;

c. A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body; and

d. A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at or in connection with a mediation.

**2. CAUTION.** This means you cannot rely on statements made in mediation. They can't be admitted in evidence in any later non-criminal proceeding UNLESS they are part of a written settlement agreement AND your settlement agreement is signed by all necessary parties and states that you want it to be an enforceable agreement (or words to that effect – see California Evidence Code section 1123).

**3. Examples.** You cannot rely on statements from the other side such as  
“You need to accept much less money than you believe is fair because I only have the following assets and would declare bankruptcy if we went to court”  
UNLESS you include this list of assets in your settlement agreement and make the accuracy of the list a condition of your settlement.

You cannot rely on statements from your own lawyer such as  
“If you accept the proposed settlement, I (your lawyer) will reduce my legal fees by this amount”  
UNLESS you ensure this is included in your settlement agreement.

### **Draft Section 1130. Attendance Sheet and Agreement to Disclosure.**

(a) An attorney representing a client for purposes of a mediation shall request that all participants in the mediation complete an attendance sheet stating their names, mailing addresses, and telephone numbers, shall retain the attendance sheet for at least two years, and shall provide it to the client on request.

b) An attorney representing a client for purposes of a mediation shall agree that mediation communications directly between the client and his or her attorney may be disclosed in any action for legal malpractice or in a State Bar disciplinary action, where professional negligence or misconduct forms the basis of the client's allegations against the attorney.

January 21, 2014

**Re: Study K-402 on Mediation Confidentiality**

Dear Commission Members and Staff,

Since this study began, I've participated in several public programs where lawyers, mediators, court administrators and law professors discussed the choices facing the Commission. Much of the discussion involved whether changing our current statutes served the public interest.

Several ideas did emerge for ways the Commission might address the competing public policy interests if it does decide change is needed:

1. **Modified standards** for attorney malpractice claims involving mediation communications. An example given was requiring willful versus negligent misconduct. This might include coercing a client to sign a settlement, either by threatening to withdraw representation or by making a false offer to reduce fees.
2. Required initial **in camera hearings** and showings. If this idea seems worth pursuing, staff may want to review for example Section 6(b) of the Uniform Mediation Act. In certain circumstances, the act allows admission of mediation communications "if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available [and] that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality..."
3. A period of time **after signing** in which a party could think over the terms, or get more information, and then **rescind** a mediated settlement agreement. If this idea seems worth pursuing, staff may want to review for example California Insurance Code section 10089.82(c). This provides consumers three business days to rescind signed settlements with their carriers in mediations conducted through the Department of Insurance.
4. Distinguishing between cases where the **underlying dispute** has and has not already **settled**, and disclosure of mediation communications could still seriously affect the outcome.
5. Admitting mediation communications in **State Bar disciplinary hearings only**, aiming to serve the public interest in reducing poor lawyering.

In virtually all the discussions, one aspect seemed to generate a wide **consensus**. This was that the Commission got it right in its comments to the current Evidence Code section 1121, enacted on the Commission's recommendation:

"...the focus is on **preventing coercion**. As Section 1121 recognizes, a mediator should not be able to influence the result of a mediation or adjudication by reporting or **threatening to report** to the decisionmaker on the merits of the dispute or reasons why mediation failed to resolve it."

Respectfully submitted,



Ron Kelly  
2731 Webster St.  
Berkeley CA 94705

**Note.** The author of this article, attorney William Rehwald, submitted it to the Law Revision Commission for consideration. He specifically authorized the Commission to post the article on its website and attach the article to a staff memorandum, which would be distributed to persons interested in Study K-402 (Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct).

## **Hide and Seek: the Uniform Fraudulent Transfer Act**

California and 42 other states, plus the District of Columbia, have enacted legislation prohibiting a debtor from transferring assets to avoid paying lawful debts. The act today is called the Uniform Fraudulent Transfer Act (UFTA). The UFTA was formally adopted in 1984 by the National Conference of Commissioners on Uniform State Laws. The UFTA was a revision of the Uniform Fraudulent Conveyance Act (UFCA) adopted in 1918. The UFCA was created to supersede the statute of 13 Elizabeth, an act passed by Parliament in 1531. It is clear that the problem of transferring property to avoid paying lawful debts has been around a long time. It is also clear that the fraudulent transfer laws have had to be updated to deal with new, creative ways that have been devised to transfer property and avoid the UFTA. This article will address the use of marital settlement agreements (MSA), mediated resolution of such agreements, and a judgment of dissolution of marriage to transfer property to avoid paying lawful debts.

### **What is a Fraudulent Transfer?**

A transfer made with the actual intent to “hinder, delay, or defraud” a creditor is a fraudulent transfer. See *Filip v. Bucurenciu*, (2005) 129 Cal. App. 4th 825. The other—a “constructive fraudulent transfer”—occurs if a debtor makes a transfer without receiving reasonable equivalent value in exchange for the transferred asset, and the debtor is left with inadequate assets to pay their debts as they become due. Whether a conveyance was made with fraudulent intent is a question of fact, and proof consists of inferences from the circumstance surrounding the transfer. See *Annod Corp v. Hamilton & Sanilens* (2002) 100 Cal.4th 1286. The courts have considered a number of factors, the “badges of fraud,” (*Id.* at

1298) described in a Legislative Committee comment to Civil Code § 3439.04. Those badges of fraud are now codified in § 3439.04(b) and are summarized as follows:

- 1) The transfer was to an insider.
- 2) The debtor retained possession or control of the property transferred.
- 3) The transfer was disclosed or concealed.
- 4) Before the transfer was made, the debtor had been sued or threatened with suit.
- 5) The transfer was of substantially all the debtor's assets.
- 6) The debtor absconded.
- 7) The debtor removed or concealed assets.
- 8) The value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred
- 9) The debtor was insolvent or became insolvent shortly after the transfer was made
- 10) The transfer occurred shortly before or shortly after a substantial debt was incurred
- 11) The debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor

There is no set "mathematical formula to establish actual intent. There is no set minimum number of factors that must be present before the scales tip in favor of a finding of actual intent to defraud." *Filip, supra* at 834. The factors simply provide guidance to the trial court. *Id.* How has the modern world of the 21<sup>st</sup> century attempted to circumvent this age old law of fraudulent transfers? The cover of the court system is the answer. In 1999, the

Court of Appeal in *Gagan v. Gouyd* (1999) 73 Cal.4th 835 held that property transferred pursuant to a MSA is not a fraudulent conveyance. This ruling opened the door for “creative lawyering.”<sup>1</sup>

*Gagan* was eventually overruled by the California Supreme Court in *Mejia v. Reed* (2003) 31 Cal.4th 657. The facts in *Mejia* probably led to the ultimate right ruling.<sup>2</sup> Dr. Reed had an extramarital affair with Mejia resulting in a child. After 25 years of marriage, Mrs. Reed petitioned for divorce in May 1995, three months after the love child was born. The Reeds entered into a MSA in which Mrs. Reed received the equity in the couple’s real estate while Dr. Reed received his “medical practice.” In June 1997, Dr. Reed abandoned that practice and went to live with his mother. He was left with no assets and very little income. Mejia then sought to collect child support from her paternity action from the Reeds’ real property transferred to Mrs. Reed by a so-called arm’s length MSA by way of a *lis pendens*. The Supreme Court, in its opinion, easily overruled *Gagan* as the trial court had ignored the precedent in its ruling as did the Court of Appeal. Restating history, the Supreme Court said this:

The UFTA was enacted in 1986; it is the most recent in a line of statutes dating to the reign of Queen Elizabeth I. “This Act, like its predecessor and the Statute of 13 Elizabeth, declares rights and provides remedies for unsecured creditors against transfers that impede them in the collection of their claims.” (Legis. Com. com., 12A West’s Ann. Civ.Code (1997 ed.) foll. § 3439.01, p. 272.) Under the UFTA, a transfer is fraudulent, both as to present and future creditors, if it is made “[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor.” (Civ.Code, § 3439.04, subd. (a).) Even without actual fraudulent intent, a transfer may be fraudulent as to present creditors if the debtor did not receive “a reasonably equivalent value in exchange for the transfer” and

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<sup>1</sup> Loopholes or safe harbors where exceptions gobble up the rule.

<sup>2</sup> Bad facts generally make bad law but not in this case.

“the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.” (Civ.Code, § 3439.05.)

*Mejia*, 31 Cal. 4th at, 664.

The Supreme Court ruled by statutory construction that the UFTA applied to all transfers by “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset...” (See Civ. Code §3439.01(i)), including transfers by a MSA.

The Supreme Court’s ruling on this issue of first impression did not stop the “dark side” of our practice from taking it one step further. What if “we went across the border to Nevada, got the divorce, and then relied on a constitutional argument of full faith and credit?” Is there any morality left in our system?

Up steps the Third District Court of Appeal in *Filip v. Bucurenciu* supra where this argument was made. Defendants Mary and Peter, for the most part residents of California, went through a divorce and a MSA that was adopted by the Nevada court after jurisdiction was acquired. Mary and Peter used the Nevada judgment of divorce as a shield to a creditor’s UFTA action. The Court of Appeal rejected the constitutional arguments and focused on whether Mary was an innocent spouse. Her position as an innocent spouse was rejected at trial, and the appellate court affirmed.

Where next by the dark side with no moral conscience? How about the “mediator’s confidentiality” and a confidential marital settlement agreement?

It is customary in a dissolution action by high profile, extremely wealthy, people like Hollywood moguls or actors/actresses to file a Petition for Dissolution of Marriage without disclosing their financial assets or property. Instead they insert the words of property

divided by a “Confidential Marital Settlement Agreement” in the Judgment of Dissolution. A judgment of dissolution of marriage is granted and no one ever knows of their property holdings unless there is a blow up between the parties. So far, nothing wrong and, in fact, protects privacy issues. Let’s further add this MSA was negotiated through mediation with the mediator signing off on the pleadings. Is this bullet proof from a claim that such a transaction violated the UFTA? Can the parties hide behind the mediation exclusionary rule?

Let me offer the following hypothetical: Mr. and Mrs. W lived many years separate and apart. They did not divorce, because the cost of splitting their real estate community was too costly. So they kept the community estate and marriage legally intact, though it was a fictitious marriage for monetary convenience. Mr. W gets sued for torture, battery, etc., after beating his live-in lover to within an inch of her life. Ten months after the beating, while awaiting trial for attempted second degree murder charges, Mr. W, while in jail, enters into a “confidential MSA” transferring all his community property to his wife, and a judgment of dissolution of marriage is entered about a year to date of the savage beating. Mr. and Mrs. W are represented by counsel, but the MSA is worked out through a mediator. A civil suit for damages is pending while all this occurs. Will Mr. and Mrs. W be able to build a wall around the division of their property and will such transfers of property be a fraudulent transfer (actual or constructive)?

Under this hypothetical, it would seem that Mr. and Mrs. W should be able to reach an appropriate financial “deal” (division of the community property), but would it protect them from the inevitable creditor’s enforcement proceedings under *Mejia*? This is especially true since he presumably gave away everything. Probably not. However, to protect themselves from a claim under the UFTA, a mediator is hired to sign off on the deal. What is going on

here? As Al Pacino in *The Scent of a Woman* aptly put it “I’m in the dark here.” Anyone who has participated in a mediation knows that whatever is said in a mediation cannot be used in court. Moreover, the mediator cannot be called to testify in court. Courts refer to this as “mediation confidentiality” as opposed to a privilege. In *Wismatt v. Superior Court* (2007) 152 Cal.4<sup>th</sup> 137, the court said it this way at footnote 4 p.150:

FN4. “Practitioners and the courts sometimes refer to the confidentiality afforded by [Evidence Code section 1115 et. seq.] to communications made in connection with mediation as a ‘mediation privilege.’ [Citations.]” (*Stewart v Preston Pipeline Inc. (2005) 134 Cal.App.4<sup>th</sup> 1565, 1572, fn. 5, 36 Cal.Rptr.3d 901.*) However, because the mediation confidentiality rules are not “privileges” in the traditional sense (*Eisendrath v Superior Court* (2003) 109 Cal.App.4<sup>th</sup> 351, 362-363, 134 Cal.Rptr.2d 716 (*Eisendrath*) [discussing some differences between statutory privileges and Evidence Code section 1115 et seq.]), and because the Evidence Code does not use the phrase “privilege,” we will use the term “mediation confidentiality.” (See *Stewart v. Preston Pipeline Inc., supra*, at p. 1572, fn. 5, 36 Cal.Rptr. 3d 901.)

The California Supreme Court has also weighed in on this confidentiality issue. In *Cassel v. Superior Court* (2011) 51 Cal.4<sup>th</sup> 113 the court said at p. 133:

[17][18] Neither the language nor the purpose of the mediation confidentiality statutes supports a conclusion that they are subject to an exception, similar to that provided for the attorney-client privilege, for lawsuits between attorney and client. (FN 10) The instant Court of Appeal’s

contrary conclusion is nothing more or less than a judicially crafted exception to the unambiguous language of the mediation confidentiality statutes in order to accommodate a competing policy concern – here, protection of a client’s right to sue his or her attorney. We and the Courts of Appeal have consistently disallowed such exceptions, even where the equities appeared to favor them.

In *Cassel*, the plaintiff sued his former lawyers for breach of their professional, fiduciary, and contractual duties while representing the plaintiff in a prior action. The plaintiff alleged that he had been coerced and harassed by the lawyers to force a settlement at mediation. The lawyers moved *in limine* to exclude evidence of conversations between the plaintiff and the lawyers both at mediation and conversations leading to the mediation. The trial court granted the motions. The plaintiff sought a writ of mandate.

In the Court of Appeal, the plaintiff was successful. The Court of Appeal, in a 2 to 1 decision, ruled that mediation confidentiality did not apply to conversations between the plaintiff and his lawyer. Rather, it applies only between the litigants. In other words, one litigant can prevent another litigant from using what occurred at mediation. However, mediation confidentiality did not protect conversations between the lawyer and the client at mediation.

The California Supreme Court granted hearing and reversed the Court of Appeal. The Supreme Court sided with the dissent’s holding at the Court of Appeal that Evidence Code §1119 excludes *all* communications in connection with mediation and all such communications shall remain confidential. Judicially crafted exceptions to this blanket exclusionary rule are not allowed.

We return to the hypothetical. It is obvious that the use of a mediator in negotiating the MSA is but another “creative way” to cover what otherwise appears to be on its face a fraudulent conveyance to avoid paying a lawful claim. The mediation confidentiality does not appear to be limited by the crime fraud exception as in the case of attorney-client privilege. Mr. and Mrs. W can manipulate a property division that makes it difficult or impossible to prove, because they can hide behind mediation confidentiality. (Yes, this loophole leaves no one but the innocent victim “in the dark here.”)

However, there is still hope that no one will be in the dark here. Evidence Code § 1123(d) provides as follows:

A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Former Evidence Code § 1152.5(a)(5) provided in part that where relevant to an issue in dispute, a written settlement agreement is admissible to show fraud or illegality. In short, mediation confidentiality cannot be used to perpetrate a fraud. Though Evidence Code § 1152.5(a)(5) was repealed, it is continued without substantive change by Evidence Code § 1123. Lee Legislative Comment to Evidence Code § 1119.

Back to the hypothetical, Mrs. W. cannot be labeled an innocent spouse. See *Filip, supra*. Her fingerprints are all over this cleverly devised scheme. Her participation in this game of hide and seek should subject her to personal liability to the judgment to be obtained by the injured victim against Mr. W.<sup>3</sup> Yes, the Settlement Agreement crafted at mediation is discoverable.

The result advocated for in no way violates mediation confidentiality. The result advocated for is fair and just and should not be blocked by creative lawyering that is attempting to keep everyone “in the dark here.”

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<sup>3</sup> This article will not address the liability of the attorneys in this scheme.

**THE SAPIRO LAW FIRM**

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JEROME SAPIRO, JR.  
DAVID A. SADERS  
GARY ALABASTER  
JOHN FENBARR HAYES (RETIRED 2006)

October 17, 2013

Law Revision Commission  
RECEIVED  
OCT 17 2013

Ms. Barbara S. Gaal, Staff Counsel  
California Law Revision Commission  
4000 Middlefield Road  
Palo Alto, CA 94303-4739

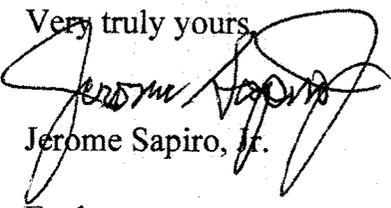
re: Relationship between Mediation Confidentiality and Attorney Malpractice and Other  
Misconduct

Dear Ms. Gaal:

In case you did not receive it from other sources, I enclose a copy of an article by Richard  
Zitrin, Esq., that was published in today's online issue of The Recorder.

Mr. Zitrin practices in San Francisco and teaches legal ethics. I consider him to be one of  
the most respected authorities in legal ethics.

Very truly yours,

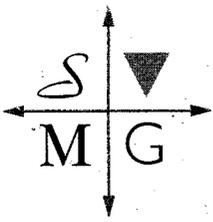
  
Jerome Sapiro, Jr.

Enclosure

cc: Richard Zitrin, Esq.

js: 1029

**Note.** Mr. Sapiro enclosed a printout of an article by Richard Zitrin entitled *Mediation Confidentiality, We Need Exceptions*. The version Mr. Sapiro provided had some typographical errors, which the publisher corrected in a later version of the article. The corrected version of the article is attached later in this Exhibit, immediately after a cover letter from Mr. Zitrin.



# SILICON VALLEY MEDIATION GROUP

January 21, 2014

JAN 22 2014

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Re: Memorandum 2013-39 (Study K-402)

Dear Commissioners:

As you waded through the testimony from three hearings and countless written submissions, I would like to ask that the Commission consider four fundamental points before drafting recommendations to the Legislature.

**Posit #1:** Those arguing against creating a malpractice exception to confidentiality speculate that people will no longer mediate and that the courts will suffer dire consequences. They imply that a malpractice exception essentially renders all other aspects of confidentiality null and void.

**Consideration:** This prediction is not supported by evidence. There are 24 states that have an explicit exception to confidentiality to report attorney and/or mediator malpractice. This number includes both UMA states, and those other states that have created their own exceptions. In addition, 11 other states have implied exceptions for malpractice. This means that approximately 75 percent of all states have created exceptions, and none of the "parade of horrors" dredged up by those opposed to a malpractice exception has materialized in those states that have disclosures.

**Posit #2:** No malpractice exception is necessary, since there are few, if any instances of malpractice.

**Consideration:** Where is the evidence? If malpractice cannot be reported, then of course there is little if any data. When you consider the serious allegations presented in *Cassel*, *Porter* and other appellate cases, one has to wonder how many additional cases were filed, and just did not get as far. Also, consider that insurance companies do not track the circumstances of where malpractice occurs. They do not maintain records that indicate if the malpractice occurred before, during or after a trial, or if it happened during mediation. There is no data to support the contention that the amount of malpractice is so insignificant that an exception is unwarranted. The Supreme Court specifically directed attention to the fact that the legislature can change the statute. Perhaps the justices were saying, "Hint! Hint!" Finally, if the Commission determines that a malpractice exception is not warranted, then what safeguard is in place that encourages attorneys to advise their clients that malpractice is protected? One might argue that the California Rules of Professional Conduct addresses the issue.<sup>1</sup> The Commission must consider if there is a duty, on either counsel or the mediator, to inform. If there is a duty to inform, the next question is, "Are attorneys and mediators

<sup>1</sup> California Rules of Professional Conduct, Chapter 3-310 says in pertinent part, "Disclosure means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client."

EX 14

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*informing anyone?"* Again, there is no way to determine compliance. Of course if the confidentiality statute remains unchanged the Commission could always recommend that an explicit requirement mandating disclosure of the fact that malpractice is protected, and that a written statement could be required to be printed in bold face in every confidentiality agreement.

**Posit #3:** Another banner waived against a malpractice exception heralds that mediation participants can create their own exceptions to confidentiality.

**Consideration:** Where is there evidence that such exceptions *are* being created on any regular basis or in a meaningful number of confidentiality agreements? There is no evidence. There is also no efficient way to determine if it will be done in the future, so the inference that it is being done, or it might be done, or it could be done is not a viable argument against creating an exception for disclosing that malpractice is protected.

**Posit #4:** Mediation confidentiality protects the participants.

**Consideration:** How does sheltering malpractice protect the participants? Creating an explicit exception for the disclosure of malpractice provides not only protection from incompetent and dishonest individuals, but also provides participants with a fundamental right of *informed consent*. Could the failure to disclose the malpractice protection afforded attorneys mean that contracts that have boilerplate requirements for mediation be voidable? Do court-connected mediation programs have an obligation to disclose that malpractice is protected? It would seem that the Commission could clear these muddied waters with a simple recommendation to create an explicit exception regarding malpractice.

In conclusion, protecting malpractice will not instill confidence in the mediation process. There is a greater probability that fewer people will want to mediate, when they learn malpractice is protected. Is there actually no need to change the rule, or is it that keeping the public uninformed is better for business? The direct question to ask is, "*Why are some lawyers and mediators against creating an exception for malpractice?*" The articulated reasons for opposition to change have been stated above, but one needs to listen to the unstated, "*I am afraid of getting sued.*" So is placing personal interests above those of the client the elephant in the room? The Commission needs to ponder these fundamental questions.

Sincerely,



Nancy Neal Yeend

nny:dlg

**EMAIL FROM RICHARD ZITRIN, SAN FRANCISCO (10/24/13)**

Dear Mr. Hebert and Ms. Gaal:

Enclosed is a letter sent to Ms. Gaal by Jerome Sapiro, an esteemed ethics lawyer. He advised me of it upon seeing my recent SF Recorder/ALM "Moral Compass" column on the problems caused by the *Cassel* case. (Please pardon ALM's on-line typos, since corrected in the print version.) Enclosed also is that article.

I urge reform, and reform that would be retroactive as to issues between a client and his/her/its own lawyer.

Thank you.

Richard Zitrin

## Viewpoint: Mediation Confidentiality, We Need Exceptions

By Richard Zitrin [Contact](#) [All Articles](#)



Back in the mid-1990s, there was a general perspective among mediators that California law provided inadequate confidentiality within the mediation process. Then in 1997, the legislature passed the California Mediation Act, which included a chapter on confidentiality and privilege, at Evidence Code §§1115 *et. seq.* This legislation set forth virtually absolute rules protecting confidentiality in the mediation process.

Then, the court of appeal decided *Foxgate Homeowners' Association v. Bramalea California Inc.*, 78 Cal.App.4th 653 (2000). In *Foxgate*, an appointed hybrid mediator/discovery master required the parties to appear with their experts for five days of hearing. Defense counsel refused to bring his experts, saying he didn't want to respond to the plaintiff's frivolous claim. The mediator prepared a report to the court, a procedure the parties had agreed to, and based on that report's conclusion that counsel had delayed and obstructed the mediation process, the trial court sanctioned defense counsel. The appeals court wrote that "[w]hile confidentiality is essential to make mediation work, so too is the meaningful, good faith participation of the parties and their lawyers." Concluding that no privilege should be read so broadly as to immunize parties and their lawyers from sanctions for disobeying court orders, the court held the mediation privilege must be waived notwithstanding the clear statutory language.

Most mediators who read this opinion were worried if not appalled that all the gains in confidentiality had been snatched away by the appeals court. But their fears were soon assuaged by the state's highest court. In its *Foxgate* opinion, 26 Cal.4th 1 (2001), the California Supreme Court, saying that confidentiality is essential to effective mediation, held that the new act provided for "no exceptions," and that the statute "unqualifiedly bars disclosure of communications" in the mediation. It reversed the appellate court and held that the mediator/referee could not report the conduct of defense counsel, even if the mediator thought

counsel acted in bad faith. The two competing issues of good faith and confidentiality directly squared off in *Foxgate*, and confidentiality won. Mediators heralded the day, I among them.

But we were wrong. A statute that allows for "no exceptions" often results in serious unintended consequences. So was it with the California Mediation Act.

In 2011, the California Supreme Court again opined on this act and again found the confidentiality protections immutable. *Cassel v. Superior Court*, 51 Cal.4th 113 (2011), concerned a client who filed a complaint against his own lawyers for legal malpractice due to advice below the standard of care given prior to and at the mediation. "Petitioner's deposition testimony," noted the court, "was consistent with the complaint's claims that his attorneys employed various tactics to keep him at the mediation and to pressure him to accept [the opposing party's] proffered settlement for an amount he and the attorneys had previously agreed was too low." But the plaintiff's own testimony as to his lawyer's incompetence was ruled inadmissible:

"The plain language of the statutes compels us to agree with ... the legislature's explicit command that, unless the confidentiality of a particular communication is expressly waived, ... [it] extends beyond utterances or writings 'in the course of' a mediation, and thus is not confined to communications that occur between mediation disputants during the mediation proceeding itself....

Plainly, such communications include those between a mediation disputant and his ... own counsel, even if these do not occur in the presence of the mediator or other disputants."

The *Cassel* court recognized the extreme consequences of its opinion, but felt compelled to "apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose." Justice Ming Chin, concurring "reluctantly," noted that "this holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. ... This is a high price to pay to preserve total confidentiality in the mediation process."

Too high a price. If the *Cassel* result was not so "absurd" as to "undermine the statutory purpose" in the unanimous view of our seven highest jurists, then the legislature must change the statute so that the unintended consequences of protecting incompetent, "deceptive," and even overtly dishonest lawyers who hurt their own clients can be corrected.

Want an example? I have recently been involved in a matter in which, in the underlying case, the plaintiffs' attorneys settled with a bank on behalf of a large number of individual plaintiffs without their clients being present at the mediation or even being aware of that the mediation was taking place. The lawyers then drafted a settlement agreement between the bank and the lawyers. Almost a year went by until the lawyers told their clients about the settlement, offered each client a pittance, and left the lawyers with millions of dollars in unearned fees. Fraudulent? Clearly. Criminal? Very possibly. But when the civil suits were filed by the clients against the lawyers, the lawyers tried to hide behind the mediation privilege; they claimed, as mediation

"participants," their conversations with the bank's lawyers at the mediation and afterwards were confidential and privileged. Even though their own clients had no idea what they were doing.

This, obviously, is an extreme case, and one in which, I believe the mediation privilege will fail. But its extreme facts harken back to the danger of the Mediation Act as drafted — that, to paraphrase Justice Chin, the act will be used to shield even deceptive (or crooked) lawyers.

Privilege and confidentiality are vitally important to the mediation process. I'm glad *Foxgate* protected that process. But while the court's reasoning is understandable, the *Cassel* case leads to an absurd result — one that allows lawyers to be sloppy, negligent and incompetent without cost to them, and even worse, to cheat their clients with impunity. Lawyers who says at mediation "I'll quit your case tomorrow if you don't settle," or "I want a 10 percent higher contingency fee before I 'let you' settle" get a free pass under the current statutes.

These statutes must be changed. The Uniform Mediation Act, approved in 2003, and now adopted or closely followed in 16 states, has a firm but wiser confidentiality policy. From the summary of the act written by the National Conference of Commissioners on Uniform State Laws:

"[T]he central rule of the UMA is that a mediation communication is confidential, and if privileged, is not subject to discovery or admission into evidence in a formal proceeding." But "as is the case with all general rules, there are exceptions." Among them:

- "Evidence that is otherwise admissible or subject to discovery";
- "A party that discloses a mediation communication and thereby prejudices another person in a proceeding is precluded from asserting the privilege to the extent necessary for the prejudiced person to respond";
- "A person who intentionally uses a mediation to plan or attempt to commit a crime, or to conceal an ongoing crime";
- A communication "made during a mediation session that is open to the public, that contains a threat to inflict bodily injury, that is sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation [of] a child"; or
- A communication "that would prove or disprove a claim of professional misconduct filed against a mediator, or against a party, party representative, or non-party participant based on conduct during a mediation."

The UMA exceptions make sense. So does the recognition that any general rule needs exceptions. California needs a strong mediation confidentiality rule. We also, clearly, need reasonable exceptions.

*Richard Zitrin is a professor at UC-Hastings and of counsel to San Francisco's Carlson, Calladine & Peterson. He is the lead author of three books on legal ethics, including The Moral Compass of the American Lawyer.*